In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-512

JOSEPH SICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the judge relied upon constitutionally infirm convictions in imposing sentence; that his motion filed pursuant to 28 U.S.C. 2255 should not have been denied without a hearing; that due process requires a judge other than the sentencing judge to hear such motions; and that this Court should exercise its supervisory power to achieve that result.

After a jury trial in the United States District Court for the Southern District of California (now the Central District), petitioner was convicted of conspiracy to commit extortion, in violation of 18 U.S.C. 1951 (count one), conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371 (count four), and conspiracy to transmit threats by means of interstate communications, in violation of 18 U.S.C. 875(b) (count five). He was sentenced to twenty years' imprisonment and fined $10,000

on count one. On counts four and five he was sentenced to five years' imprisonment on each count, to run consecutively with each other but concurrently with count one. The court of appeals affirmed on counts one and four but reversed and remanded on count five. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. Petitioner was not retired on count five.

Petitioner then brought the present proceedings under 28 U.S.C. 2255, challenging the imposition of his sentence. Judge Boldt, who had sentenced petitioner, denied the motion without a hearing, and the court of appeals affirmed.

Evidence adduced at trial[1] showed that petitioner was one of the "strong-arm" men in a conspiracy to secure managerial control of Don Jordan, a welterweight fighter who later won the title. When Jordan's manager refused to relinquish control, the co-conspirators sought the assistance of petitioner who, as revealed during trial, had a reputation for violence.

1. Petitioner's contention that Judge George Boldt[2] relied upon constitutionally infirm convictions in imposing sentence was explicitly rejected by that judge in his denial of petitioner's motion to vacate sentence.[3] In his order denying the motion Judge Boldt said (App. A, pp. 3-4):[4]

> The laborious process of closely examining every page of the trial transcript in order to evaluate the credibility and significance of the testimony of all

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[1]A detailed description of the activities of this conspiracy can be found in *Carbo* v. *United States, supra.*

[2]The original trial judge, Judge Tolin, died before sentencing. Judge Boldt was assigned to the case and reviewed the record for approximately four months before imposing sentence.

[3]Petitioner contends that his prior convictions are invalid under *Gideon* v. *Wainwright,* 372 U.S. 335. The record does not disclose whether there is any substance to this contention.

[4]"App." refers to the separate appendix filed with the petition. The pages are unnumbered, but our reference is to the third page of the order in question.

> witnesses, including Sica, provided a more important and significant basis for determining the sentence appropriate for Sica than any information contained in the presentence report and in the mind of this judge, in itself, amply justified the sentence imposed * * *.
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> * * * In all the circumstances hereinabove set forth, the sentencing judge was entitled to and, in fact, did base Sica's sentence solely on the depravity and viciousness of his conduct as disclosed by the trial record.

This statement by Judge Boldt that petitioner's sentence was based solely on the depravity and viciousness of his conduct as disclosed in the trial record is consistent with the record at sentencing. While the judge mentioned petitioner's felony convictions (Pet. 10), his characterization of petitioner as an habitual criminal who had never followed any socially productive pursuits was made after extensive review of the trial transcripts and does not show a reliance upon his three prior felony convictions. The judge was of course entitled to consider factors other than criminal convictions in imposing sentence. See *United States* v. *Marcello,* 423 F. 2d 993, 1012 (C.A. 5), certiorari denied, 398 U.S. 959.

Since the record does not support petitioner's contention that the judge explicitly relied upon the arguably infirm convictions, and the judge stated that the sentence was not enhanced because of those convictions, petitioner's reliance upon *United States* v. *Tucker,* 404 U.S. 443, is misplaced and he is not entitled to resentencing. *United States* v. *Green,* 483 F. 2d 469, 471 (C.A. 10), certiorari denied, 414 U.S. 1071; *Rogers* v. *United States,* 466 F. 2d 513 (C.A. 5), certiorari denied, 409 U.S. 1046.

2. Nor did the judge violate 28 U.S.C. 2255 in denying petitioner's motion without a hearing. Contrary to his contention, petitioner did not make a *prima facie* showing of the judge's reliance upon invalid convictions; the records and files of the case fully support the opposite conclusion. Indeed, a hearing is singularly inappropriate where the question turns upon the state of mind of the judge himself. Of course, if the judge had determined that the allegedly infirm convictions had influenced his imposition of sentence, a hearing to examine the validity of the convictions might have been required, but not otherwise. See, *e.g.*, *Lipscomb* v. *Clark*, 468 F. 2d 1321, 1323 (C.A. 5).[5]

3. Due process does not require a judge other than the sentencing judge to hear motions alleging enhancement of sentence based on constitutionally infirm convictions. Petitioner's reliance upon *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1), 394 F. 2d 149, affirmed on other grounds, 394 U.S. 831, is misplaced. *Halliday* (*id.* at 274) specifically holds that a sentencing judge may review a Section 2255 petition to determine whether an evidentiary hearing is required. *Halliday*, moreover, was concerned with the desirability of a separate judge conducting a hearing on what occurred in the courtroom as to a plea of guilty, not, as here, what considerations the first judge had in mind in imposing the sentence. A separate judge would be peculiarly at a disadvantage in attempting to determine the basis upon which the other judge determined the sentence. See, *e.g.*, *United States* v. *Smith*, 337 F. 2d 49, 51-52 (C.A. 4), certiorari denied, 381 U.S. 916.

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[5]Some circuits have adopted the procedure that the petitioner must challenge the validity of the convictions prior to his filing of a Section 2255 motion. See *e.g.*, *Brown* v. *United States*, 483 F. 2d 116 (C.A. 4).

Petitioner has made no showing of bias or prejudice that should lead this Court, under its supervisory power, to exclude the sentencing judge from consideration of this motion. *cf. Elkins* v. *United States*, 364 U.S. 206.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.